Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-836

Lewis Jasper Thompson,

Appellant

v.

Commonwealth Of Virginia,

Appellee

On Appeal from the Supreme Court of Virginia

JURISDICTIONAL STATEMENT

W. H. C. Venable
Michael S. Shelton
Cohen, Abeloff & Staples
1128 Ross Building
Richmond, Virginia 23219

IN THE

Supreme Court of the United States

No.

Lewis Jasper Thompson,

Appellant

v.

Commonwealth Of Virginia,

Appellee

On Appeal from the
Supreme Court of Virginia

JURISDICTIONAL STATEMENT

Lewis Jasper Thompson seeks review of the affirmance of his conviction by the Supreme Court of Virginia. The decision of the Supreme Court of Virginia was unreported but the order of the Court is appended to this petition (Appendix I). The order of the Court was entered on August 26, 1976 and Notice of Appeal was filed on September 16, 1976 (Appendix II).

The proceeding upon which the conviction is based was a criminal action brought in the Circuit Court of Chesterfield County pursuant to Virginia Code § 54-524.101:1 (Repl. Vol 1974) (presently codified at § 18.2-248). It is contended by

Thompson that the state statute under which he was convicted is unconstitutional because it places an affirmative burden of proof upon him which prejudiced his presumption of innocence and constituted an unconstitutional denial of due process. Jurisdiction for this appeal is conferred upon this Court by 28 U.S.C. § 1257(2) which reads:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The statute under which Thompson was tried and convicted is challenged as being repugnant to the United States Constitution and the decisions of this Court, in particular, *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The statute as follows:

> Except as authorized in The Drug Control Act, chapter 15.1 (§ 54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to manufacture, sell, give or distribute a controlled substance.
>
> (a) Any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; any person, upon a second or subsequent conviction of a violation of this section involving an opiate or synthetic opiate drug, may in the discreation of the court or jury imposing the sentence, be sentenced to confinement in the penitentiary for a term of life imprisonment or for any period not less than five years; provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II other than marijuana only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such

> controlled substance, he shall be guilty of a Class 5 felony; and provided further, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana or a controlled substance classified in Schedule III only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 1 misdemeanor.
>
> Provided, further, that if the violation of the provisions of this article consist of the filling by a pharmacist of the prescription of a person authorized under this article to issue the same, which prescription has not been received in writing by the pharmacist prior to the filling thereof, and such written prescription is in fact received by the pharmacist within one week of the time of filling the same, or if such violation consists of a request by such authorized person for the filling by a pharmacist of a prescription which has not been received in writing by the pharmacist and such prescription is, in fact, written at the time of such request and delivered to the pharmacist within one week thereof, either such offense shall constitute a Class 4 misdemeanor.
>
> (b) Any person who violates this section with respect to a controlled substance classified in Schedules III, IV, V or VI shall be guilty of a Class 1 misdemeanor. (Code) 1950, § 54-524.101:1; 1972, c. 798; 1973, c. 479; 1974, c. 586; 1975, cc. 14, 15; 1976, c. 614.)

STATEMENT OF QUESTION PRESENTED

Whether the statute is question which placed an affirmative burden of proof upon Thompson to disprove an element of the offense for which he was convicted is unconstitutional as a violation of due process.

STATEMENT OF SUBSTANTIAL FEDERAL QUESTION

The instant case raises a federal question of due process as interpreted by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). It is imperative that this question be heard by this Court because of the lack of regard that the Virginia Supreme Court has shown for the constitutional mandates set forth by this Court in *Mullaney* in its affirmance of Thompson's conviction as well as its holdings in several other recent cases.

STATEMENT OF THE CASE

Thompson was arrested on September 13, 1974 and charged with the unlawful possession of marijuana with the intent to distribute. A preliminary hearing was held in the General District Court of Chesterfield County on December 4, 1974 before Hon. J. F. Daffron, Jr., Judge. After presentation of evidence by the Commonwealth, the matter was certified to the Grand Jury which subsequently returned an indictment at its January term, 1975. The matter was tried on May 2, 1975 in the Circuit Court of Chesterfield County before Hon. Ernest P. Gates, Judge, at which time Thompson was found guilty as charged. Upon motion, the defendant challenged his conviction as a denial of due process, which motion was denied. A hearing was held on September 22, 1975 relative to sentencing; on September 29, 1975 Thompson was sentenced to twenty years imprisonment with suspension of ten years.

A notice of appeal and assignment of error was filed on October 29, 1975 in the Supreme Court of Virginia. The petition, which raised the same question as presented to this Court, was rejected and the writ of error and supersedeas were refused on August 26, 1976. Notice of Appeal to this Court was filed on September 16, 1976 with the Clerk of the Circuit Court of Chesterfield County as required by Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF FACTS

The facts are essentially unmaterial to the consideration of the question presented. The only fact necessary is that the Commonwealth presented no evidence that Thompson had a

motive to profit from distribution of drugs or an intent to induce addiction or use by any intended recipient. The trial court ruled that such evidence was not necessary for conviction because the burden was on Thompson to disprove intent, not upon the Commonwealth to prove it.

ARGUMENT

The Statute Under Which Thompson Was Convicted Placed an Affirmative Burden of Proof on Thompson Which Prejudiced His Presumption of Innoncence and Constituted an Unconstitutional Denial of Due Process.

Thompson was indicted for unlawful possession of marijuana with the intent to distribute. Thompson's alleged conduct was proscribed by Va. Code §54-524.101:1 (Repl. Vol. 1974) (presently codified at §18.2-248) (Appendix II). Under this statute, two separate offenses are detailed: (1) possession of marijuana with the intent to distribute and with the intent to profit thereby or induce addiction on the part of the recipient, which provides a penalty of five to forty years imprisonment and a fine of one to twenty-five thousand dollars; and (2) possession of marijuana with the intent to distribute but without the intent to profit or to induce addiction, which provides a penalty of not more than twelve months confinement and a fine of not more than one thousand dollars. *See Jefferson v. Commonwealth*, 214 Va. 432, 434-35, 201 S.E.2d 749, 751 (1974).

A necessary element distinguishing the two offenses is the intent to profit or induce addiction. The Virginia General Assembly, by amendment effective July 1, 1973, has presumed such an intent and has placed the affirmative burden on the defendant to prove the absence of such intent in order to mitigate his offense to the lesser crime.

By placing such a burden on Thompson in the instant case, the statute has effectively required Thompson to establish his innocence and to disprove facts necessary to establish the crime for which he was charged and convicted. This burden is unconstitutional, as violative of the minimum guarantees of due process, and stands contrary to a long line of authority from the United States Supreme Court. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

A. The burden of proof was placed upon Thompson to disprove an element of the offense for which he was convicted.

The legislative and judicial development of Va. Code § 54-524.101:1 (Repl. Vol. 1974) (presently codified at § 18.2-248) makes it clear that the burden rested upon Thompson to disprove the intent to profit. The statute as originally enacted provided no express presumption of an intent but one was subsequently read into the statute by the lower courts. In *Jefferson v. Commonwealth, supra,* the Supreme Court of Virginia was called upon to interpret the statute and determine the existance of such a presumption. The trial court in *Jefferson* had refused to instruct the jury regarding the lesser included offense relying upon Va. Code § 54-524.108 (Repl. Vol. 1974) (presently codified at § 8-263), which affirmatively placed the burden upon the defendant to prove every proviso within the statute. The Virginia Supreme Court, however, held § 54-524.108 inapplicable and found that no statutory presumption existed. Two grounds were relied upon for the reversal of Jefferson's conviction. First, the defendant was entitled to have the criminal statute under which he was convicted strictly construed. On this basis, the proviso of a lesser-included offense could not be read as an indication by the General Assembly of an intention to create an implied presumption. Second, the burden was on the Commonwealth to prove beyond a reasonable doubt every material and necessary element of the offense charged. The defendant was not required to prove anything but could rely solely upon the Commonwealth's failure to establish every element of his guilt.

In *Jefferson,* the failure of the Commonwealth to put forth any evidence that the defendant had an intent to profit or induce his recipient to become addicted made an instruction concerning the greater offense inappropriate and an instruction concerning the lesser included offense required.

The Virginia General Assembly obviously took a narrow interpretation of the *Jefferson* decision. In 1973, the statute was amended to expressly require that the defendant prove that any distribution was only an accommodation without the intent to profit or induce addiction. Va. Acts of Assembly 1973, ch.479,

at 1027. It was under this statute, with its express mandatory presumption that Thompson was convicted.

B. This case is controlled by the principles of *Mullaney v. Wilbur* which prohibits the Commonwealth from shifting the burden of proof to Thompson as to any element or circumstance of the crime.

The constitutional requirement which prohibits the state from forcing a defendant to prove his innocence has been articulated by this Court and was the basis for the recent decision in *Mullaney v. Wilbur,* 421 U.S. 684 (1975). In *Mullaney,* the defendant was charged with homicide and under state law, once a killing was shown to be intentional and without justification, malice, an indespensible element of the greater offense of murder, was presumed and the homicide was punishable as murder unless or until the defendant could show the absence of malice in which case it was punishable as the lesser-included offense of manslaughter.

This Court held the procedural technique of shifting burdens to be unconstitutional as violative of minimum due process guarantees. According to the Court, the disposition in *Mullaney* was easily controlled by the prior decision in *In re Winship,* 397 U.S. 358, 364 (1970), which "explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The requirement that the state prove beyond a reasonable doubt every element or circumstance necessary to constitute the offense was recognized by this Court as having a vital role in the application of the criminal law. Such a requirement was based upon the fundamental value judgment of society that the accuracy and reliability of criminal convictions must be insured in order to command the respect and confidence of the community in the administration of justice. Without this guarantee, the public would be left in doubt about whether innocent men were being convicted as the likelihood of an erronous conviction would be appreciably increased. Under the burden imposed in *Mullaney,* just as the burden imposed by statute on Thompson, a defendant could receive a harsher sentence "when evidence indicates that it is *as likely as not* that he deserves a significant-

ly lesser sentence." 421 U.S. at 703 (emphasis by Court). Such a result was found intolerable in *Mullaney* and is no less intolerable here.

The *Mullaney* decision adopts no new principles from those articulated by this Court in *In re Winship, supra.* The *Mullaney* decision[1] merely expands application of these principles to prohibit the Commonwealth from shifting the burden of proof, not only as to a material and necessary element of an offense, but as to any fact or circumstance that might distinguish degrees of an offense or might provide for different penalties. Under these controlling principles, Thompson's conviction is constitutionally infirm.

C. The unconstitutional burden which was placed upon Thompson regarding his presumption of innocence was not harmless but prejudiced Thompson's defense at trial and raises grave doubts as to the certainty of his conviction.

The constitutional error in this instance has cast grave doubts upon Thompson's conviction and can hardly be considered harmless. The leading case on harmless error, *Chapman v. California,* 386 U.S. 18, 24 (1967), states that when the error involves the denial of a federal constitutional right, there is a presumption of prejudice in a criminal prosecution unless and until the beneficiary of the error, the Commonwealth in this instance, can prove beyond a reasonable doubt that it did not contribute to the defendant's conviction. In *Chapman,* this Court pointed out that "some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. . . ." 386 U.S. at 23. No error is more prejudicial than one which shifts, unfavorably, the burden of proof, and therefore, an error which does so, such as that suffered by Thompson, can never be harmless.

The facts in this case show that clear harm resulted to Thompson from the error. No evidence was offered by the Commonwealth of any intent by Thompson to profit or induce addiction of another. The Commonwealth rested solely upon the unconstitutional presumption which placed the burden on Thompson

[1] It is clear that the *Mullaney* decision is entitled to retroactive application. *See Ivan v. City of New York,* 407 U.S. 203 (1972).

to disprove these facts. Yet these facts were clearly needed for conviction as Thompson received a twenty year sentence, a penalty that could only be imposed under the greater offense. The lack of any evidence supporting this necessary element of Thompson's guilt clearly shows that the trial judge also relied upon the unconstitutional presumption for his determination. The only cure for the error, therefore, is reversal of Thompson's conviction.

D. Recent decisions by the Virginia Supreme Court including the instant case evidence a disregard of the *Mullaney* ruling and demand a definitive ruling by this Court.

The instant case is clearly controlled by the principles enunciated by this court in *Mullaney v. Wilbur, supra,* yet the Virginia Supreme Court refused to rule the Virginia statute unconstitutional. In such a situation a defendant convicted under the statute has only one remedy open to him, appeal to this court. If this court refuses to hear that challenge, that defendant is left without a remedy as is any defendant subsequently convicted under the statute.

The Supreme Court of Virginia has evidenced its intention to ignore the constitutional mandate set forth by this Court in *Mullaney* with regard to its drug laws in the instant case and with regard to its murder statute in the case of *Hodge v. Commonwealth,* No. 751187 (October 8, 1976) and followed by *Daughtry v. Commonwealth,* No. 760057 (October 8, 1976) and *Warlitner v. Commonwealth,* No. 760163 (October 8, 1976). Since the Virginia drug and murder statutes have provisions which shift the burden of proof analogous to the provisions in the Maine murder statute which this Court found intollerable in *Mullaney,* the question of the constitutionality of the drug statute presented by the instant case demands a definitive ruling by this Court resulting in a reversal of Jack Thompson's conviction.

CONCLUSION

Thompson's conviction was obtained as a result of unconstitutional and erronous application of Va. Code § 54-524.101:1 (Repl. Vol. 1974). The shift of the burden of proof to Thompson to disprove an element of the offense for which he was

convicted violates the due process guarantees afforded a criminal defendant and stands contrary to the decisions of this Court.

Thompson's petition presents serious doubts as to the validity of his conviction and also raises serious questions regarding the constitutionality of the drug laws of Virginia.

Respectfully submitted,
LEWIS JASPER THOMPSON

By _____

W. H. C. Venable
Michael S. Shelton
Cohen, Abeloff & Staples
1128 Ross Building
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that on the 17th day of December, 1976, a true and correct copy of the foregoing Jurisdictional Statement was mailed to Oliver D. Rudy, Esquire, Commonwealth's Attorney for Chesterfield County, Chesterfield, Virginia.

WHC Venable

W. H. C. Venable

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 26th *day of* August, 1976.

The petition of Lewis Jasper Thompson, Jr., sometimes known as Lewis Jasper Thompson, for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Chesterfield County on the 29th day of September, 1975, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

Record No. 760110

A Copy,

Teste:

Howard G. Turner, Clerk

By: Richard R. Bonnal

Deputy Clerk

ARTICLE 1.

Drugs.

§ 18.2-248. Penalties for manufacture, sale, gift, distribution or possession of a controlled drug. — Except as authorized in The Drug Control Act, chapter 15.1 (§ 54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.

(a) Any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; any person, upon a second or subsequent conviction of a violation of this section involving an opiate or synthetic opiate drug, may in the discretion of the court or jury imposing the sentence, be sentenced to confinement in the penitentiary for a term of life imprisonment or for any period not less than five years; provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II other than marijuana only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony; and provided further, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana or a controlled substance classified in Schedule III only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 1 misdemeanor.

Provided, further, that if the violation of the provisions of this article consist of the filling by a pharmacist of the prescription of a person authorized under this article to issue the same, which prescription has not been received in writing by the pharmacist prior to the filling thereof, and such written prescription is in fact received by the pharmacist within one week of the time of filling the same, or if such violation consists of a request by such authorized person for the filling by a pharmacist of a prescription which has not been received in writing by the pharmacist and such prescription is, in fact, written at the time of such request and delivered to the pharmacist within one week thereof, either such offense shall constitute a Class 4 misdemeanor.

(b) Any person who violates this section with respect to a controlled substance classified in Schedules III, IV, V or VI shall be guilty of a Class 1 misdemeanor. (Code 1950, § 54-524.101:1; 1972, c. 798; 1973, c. 479; 1974, c. 586; 1975, cc. 14, 15; 1976, c. 614.)

The 1976 amendment substituted "Schedule I or II" for "Schedules I, II or III" near the beginning of the first paragraph of subdivision (a) and inserted "III" near the middle of subdivision (b).

"Possession."

To establish "possession" in a legal sense, it is not sufficient to simply show actual or constructive possession of the drug by the defendant. The Commonwealth must also establish that the defendant intentionally and consciously possessed it with knowledge of its nature and character. Burton v. Commonwealth, 215 Va. 711, 213 S.E.2d 757 (1975).

To convict a defendant of illegal possession of drugs, the Commonwealth must prove that the defendant was aware of the presence and character of the drugs, and that he intentionally and consciously possessed them. Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975).

Possession may be proved by evidence of acts and declarations of conduct of the accused from which the inference may be fairly drawn that he knew of the existence of narcotics at the place where they were found. Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975).

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 760110

LEWIS JASPER THOMPSON, JR., Defendant/Appellant

v.

COMMONWEALTH OF VIRGINIA, Plaintiff/Appellee

NOTICE OF APPEAL

Notice is hereby given that Lewis Jasper Thompson, Jr. hereby appeals to the United States Supreme Court pursuant to 28 U.S.C. §1257(2) from the final judgment of the Supreme Court of Virginia entered in this action on the 26th day of August, 1976, which judgment had the effect of affirming the final judgment of the Circuit Court of the County of Chesterfield entered in this action on the 29th day of September, 1975.

Respectfully submitted,

LEWIS JASPER THOMPSON, JR.

By _____
Counsel

W. H. C. Venable
Michael S. Shelton
COHEN, ABELOFF & STAPLES
1128 Ross Building
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that on the 16 day of September, 1976, a true and correct copy of the foregoing Notice was mailed to Howard G. Turner, Clerk of the Supreme Court of Virginia, Lewis H. Vaden, Clerk, Circuit Court of the County of Chesterfield, Oliver D. Rudy, Commonwealth's Attorney for the County of Chesterfield and Andrew P. Miller, Attorney General for the Commonwealth of Virginia.

_____
W. H. C. Venable

Supreme Court, U. S.
FILED
DEC 20 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-836

LEWIS JASPER THOMPSON,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Virginia

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

ANDREW P. MILLER
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

In The

Supreme Court of the United States

October Term, 1976

No. .....

LEWIS JASPER THOMPSON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

On Appeal from the Supreme Court of Virginia

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

PRELIMINARY STATEMENT

The appellee, Commonwealth of Virginia, respectfully moves this Honorable Court to affirm the judgment of the Supreme Court of Virginia entered on August 26, 1976, affirming the appellant's conviction in the Circuit Court of Chesterfield County, Virginia.

OPINION BELOW

The judgment of the Supreme Court of Virginia is not reported as it was a refusal of a Writ of Error without opinion and is contained in the appendix to the Jurisdictional Statement at page 13.

JURISDICTION

Appellant asserts that the jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether the statute in question placed an affirmative burden of proof upon appellant to disprove an element of the offense for which he was convicted.

STATEMENT OF THE CASE

The appellant was tried by the Circuit Court of Chesterfield County, sitting without a jury, on May 2, 1975, on an indictment charging possession of marijuana with the intent to distribute. The appellant was found guilty as charged, and after receiving a presentence report, the trial court fixed punishment at twenty years in the penitentiary with ten years being suspended. The Supreme Court of Virginia denied and refused a petition for a Writ of Error, thus affirming the judgment of the Circuit Court of Chesterfield County.

The evidence at trial established that the appellant had in his possession marijuana with the approximate weight of ninety-eight and one-half pounds (Tr. 216). A set of scales and plastic baggies were also seized along with the marijuana (Tr. 29, 30, 171).

All references are to the trial transcript of May 2, 1975, and designated (Tr. ....).

ARGUMENT

I.

The Virginia Statute In Question Does Not Place The Burden Of Proof Upon Appellant To Disprove An Element Of The Offense Of Which He Was Convicted.

Appellant was tried for a violation of § 54-524.101:1 of the Code of Virginia (1950), as amended. This section was repealed by Chapter 589, [1975] Acts of Assembly 1233, and was recodified as § 18.2-248. Chs. 14, 15, [1975] Acts of Assembly 18, 102. At the time of appellant's conviction the statute in question provided, in pertinent part, as follows:

> § 54-524.101:1. Unlawful acts; penalties.—Except as authorized in this chapter, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.
>
> (a) Any person who violates this section with respect to a controlled substance classified in Schedules I, II or III shall upon conviction, be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; any person, upon a second or subsequent conviction of a violation of this section involving an opiate or synthetic opiate drug, may in the discretion of the court or jury imposing the sentence, be sentenced to confinement in the penitentiary for a term of life imprisonment or for any period not less than five years; provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II other than marijuana only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such con-

trolled substance, he shall upon conviction be imprisoned for not less than one nor more than ten years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail not exceeding twelve months and fined not more than one thousand dollars; and provided further, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana or a controlled substance classified in Schedule III only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall upon conviction be confined in jail not exceeding twelve months and fined not more than one thousand dollars.

Appellant premises his argument upon this Court's holding in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975). For the reasons which follow the appellee submits that the questioned statute does not violate *Mullaney*.

The specific language of the statute under attack is the proviso, which appellant contends places the burden of proof upon him to disprove the intent to profit or induce addiction. The Supreme Court of Virginia has previously held that this language merely supplies a rebuttable presumption against accommodation distribution. *Brown* v. *Commonwealth*, 215 Va. 753, 213 S.E.2d 764 (1975). This Court in *Mullaney, supra*, specifically held that the decision did not effect the use of presumptions which require the defendant to produce sufficient evidence to generate a jury issue. *See* 421 U.S. 701, nn.28, 31.

In *Jefferson* v. *Commonwealth*, 214 Va. 432, 201 S.E.2d 749 (1974), the Supreme Court of Virginia ruled in a similar case that there was no burden upon a defendant to prove anything, and that the burden is on the Commonwealth to prove beyond a reasonable doubt every material and necessary element of the criminal offense charged.

The appellee submits that the prior decisions of the Supreme Court of Virginia clearly establish that the questioned statute does not place the burden of persuasion upon the appellant, and that the Virginia Supreme Court decisions are entirely in line with this Court's decision in *Mullaney*.

In his statement of facts, the appellant states that the trial court ruled that the burden was upon him to disprove intent, and not upon the Commonwealth to prove it. The appellee has searched the entire record and is unable to find any such ruling by the trial court.

Contrary to the assertions by appellant that the Supreme Court of Virginia is disregarding this Court's ruling in *Mullaney*, the previously cited cases show unequivocally that the Virginia Supreme Court was applying the principle enunciated in *Mullaney*, prior to this Court issuing that opinion.

As this Court so pointedly noted in *Mullaney*, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 703, 704. In the present case accommodation never became an issue, since there was no evidence introduced either by the Commonwealth or by the appellant which could properly raise this issue.

The appellant was convicted of possession of marijuana with intent to distribute. The Commonwealth introduced evidence to establish that appellant had in his possession marijuana with a weight of approximately 98.5 pounds, a set of scales and plastic baggies. The trial court noted that the baggies would go toward establishing intent to distribute (Tr. 40). In *Hunter* v. *Commonwealth,* 213 Va. 569, 193 S.E.2d 779 (1973), the Virginia Supreme Court made it

abundantly clear that quantity may be considered along with other circumstances to support an inference of intent to distribute and that quantity alone, under certain circumsances, may be sufficient to support an inference of intent to distribute. *See United States* v. *Childs,* 463 F.2d 390 (4th Cir. 1972). This evidence establishes that the Commonwealth proved every element of the offense of which appellant was convicted, and indeed the appellant is not contesting the sufficiency of the evidence.

CONCLUSION

For the foregoing reasons, the appellee submits that this Honorable Court should affirm the judgment of the Supreme Court of Virginia.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the appellee in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 17th day of December, 1976, I mailed, first class postage prepaid, three copies of the foregoing Motion to Affirm to W. H. C. Venable, Esquire, 1128 Ross Building, Richmond, Virginia 23219, counsel of record for appellant.

JAMES E. KULP
Assistant Attorney General